82-1580

No.

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CLERK

In the Supreme Court of the United States

October Term, 1982

CARL A. DeMICHAEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535
Counsel for Petitioner

March 21, 1983

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner DeMichael subjected to vindictive prosecution in this case to penalize his vigorous defense against prior charges?

2. Was petitioner DeMichael denied due process of law because the prosecution failed to respect the terms of a prior plea bargain which would have precluded prosecution of the instant case?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The caption of this case in this Court contains the names of all parties to the proceedings to be reviewed.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
List of All Parties to Proceedings Below	i
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Raising the Federal Question	3
Reasons for Granting the Writ	4
I. The Government Pursued The Instant Charges To Penalize DeMichael For Vigorously Defending And Opposing Prior Criminal Charges	4
II. The Government Failed To Respect The Terms Of A Prior Plea Bargain Which Would Have Precluded Prosecution Of The Instant Charges	7
Conclusion	10

TABLE OF AUTHORITIES

Cases

PAGE

Blackledge v. Perry, 417 U.S. 21 (1974) 5

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 5

Cooper v. United States, 594 F.2d 12 (4th Cir. 1979) 8

North Carolina v. Pearce, 395 U.S. 711 (1969) 6

Santobello v. New York, 404 U.S. 257 (1971) 7-8

Constitutional Provisions

Fifth Amendment 1

Statutes and Rules

18 U.S.C. § 1343 2

18 U.S.C. § 2314 2

28 U.S.C. § 1254(1) 1

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in the Appendix. App. 1-8.

JURISDICTION

The decision of the Court of Appeals was entered on October 29, 1982. A motion for rehearing was denied on January 20, 1983. This petition is filed within 60 days of that date. This Court's jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment: No person . . . shall be . . . deprived of liberty . . . without due process of law.

STATEMENT OF THE CASE

On November 19, 1980, a grand jury returned a three count indictment against DeMichael and five other defendants. All defendants were charged with a conspiracy to violate 18 U.S.C. §§ 1343 (wire fraud) and 2314 (interstate transportation of stolen property) from on or about November 27, 1977 to on or about December 15, 1977. The overt acts alleged the various roles of the defendants in a scheme to defraud and obtain money from Francis Hobl. The defendants were also charged with the substantive violations of 18 U.S.C. §§ 1343 and 2314 in Counts II and III. Counts II and III were dismissed after a superseding indictment charging the same violations was issued on January 14, 1981. The substantive counts alleged a scheme to defraud Mr. Hobl substantially similar to the overt acts alleged in the conspiracy count of the original indictment.

Defendants filed pretrial motions which were the subject of evidentiary hearings which led to the dismissal of Count I of the original indictment on double jeopardy grounds by the trial court.

On October 27, 1982 the parties presented the trial court with a proposed resolution of the case which basically involved presenting a stipulation of expected testimony to the court in exchange for certain concessions by the government individualized for each defendant.

With respect to defendant DeMichael, two stipulations were presented to and accepted by the court. On the basis of the stipulations, the court found DeMichael guilty of Count 1 of the superseding indictment (wire fraud). Count 2 of the superseding indictment was dismissed upon the government's motion pursuant to the stipulation. A post-verdict motion renewing a pre-trial motion was denied on November 10, 1981.

On February 3, 1982 defendant was sentenced to three years incarceration. Execution of the sentence was stayed pending appeal. An appeal followed to the United States Court of Appeals for the Seventh Circuit, resulting in affirmance of petitioner's conviction.

The trial stipulation contained sufficient facts to support the trial court's finding of guilt on Count 1 of the superseding indictment. That finding was not challenged on appeal. Briefly, the facts showed that the defendants defrauded Francis Hobl of $36,262 in a home improvement fraud scheme during November and December, 1977.

RAISING THE FEDERAL QUESTIONS

Petitioner filed motions to dismiss both indictments on the grounds of vindictive prosecution and violations of a plea agreement. These issues were expressly considered in the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT PURSUED THE INSTANT CHARGES TO PENALIZE DeMICHAEL FOR VIGOROUSLY DEFENDING AND OPPOSING PRIOR CRIMINAL CHARGES.

Petitioner's motions to dismiss arose out of a series of events that started with a state prosecution in Milwaukee County, Wisconsin entitled *State of Wisconsin* v. *Robert Richard Brown, et al.*, Case No. J-2145, then moved to a federal prosecution in the Northern District of Illinois entitled *United States* v. *Robert Brown, et al.*, Case No. 80-CR-285, and wound up in a federal prosecution in the Eastern District of Wisconsin under the instant indictments.

In February, 1978, a Milwaukee County, Wisconsin prosecutor filed criminal fraud charges against DeMichael and others. These charges were dismissed in March at a preliminary hearing for lack of evidence. The charges were re-issued. In April another state court judge dismissed the charges. The state prosecutor then transferred his file materials to a Milwaukee F.B.I. agent and a federal prosecutor in Milwaukee began a file on the fraud charges in August, 1978. At the same time the state prosecutor appealed the dismissals.

On May 6, 1980 the Wisconsin Supreme Court rendered a decision basically upholding the earlier dismissals of charges.

Then on May 8, 1980 the federal government returned an indictment for fraud against DeMichael in the Northern District of Illinois in Case No. 80-CR-285. The Milwaukee federal prosecutor was kept advised of developments. Trial proceedings in July, 1980 culminated in a plea agreement in which DeMichael would either receive a sentence of no more than one year in prison or he would be permitted to withdraw his plea of guilty.

On October 7, 1980 DeMichael was sentenced to one year in prison pursuant to the plea agreement in the Northern District of Illinois. Then on October 20, 1980 DeMichael's sentence was modified to allow for work release.

Just thirty days later, on November 19, 1980 the instant indictment was returned. This was more than two years after the federal prosecutor was given full notice of the commission of the alleged crimes of fraud against Francis Hobl.

Petitioner respectfully submits that this chain of events necessarily raises the ugly spectre of a due process violation because of prosecutorial vindictiveness. Due process is violated when criminal charges are brought in retaliation for the exercise of a right protected by law.

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the [government] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978) (citation omitted).

Thus, in *Blackledge* v. *Perry,* 417 U.S. 21 (1974), the defendant was charged with a misdemeanor and tried in a state district court. Upon his conviction, he filed a notice of appeal. The act of filing a notice of appeal entitled him to a trial *de novo* in the superior court. After he filed the notice of appeal, the prosecutor obtained an indictment charging him with a felony arising out of the same event. After a plea of guilty to the felony charge, the defendant sought relief in federal court by habeas corpus.

This Court decided that the process of "upping the ante" when a defendant moved from the district court to the superior court for a *de novo* trial violated due process

rights. The Court's opinion was predicated upon the earlier case of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), which dealt with the problems of judicial vindictiveness when a defendant is given a longer sentence following a retrial obtained by successfully appealing the prior conviction. The Court in *Perry* said that the prosecutor's interest in discouraging *de novo* trials was so great that the Court would not permit an increase in charges.

The Court was concerned that any procedural remedy would not sufficiently alleviate the apprehension of a criminal defendant that an appeal seeking *de novo* trial would be met by retaliation. Thus, although the Court admitted that there was no evidence to show that the prosecutor had acted in bad faith or maliciously in bringing the felony charges, it limited the prosecutor's discretion to elect the charges upon which the defendant should be tried. The pattern in *Perry* began with a first set of criminal charges. The second step in the sequence was the successful exercise by the defendant of some legal right. In this case, the success was the result of a series of events that occurred in the trial in the Northern District of Illinois. The result was a disposition for defendant DeMichael which was quite favorable to him. The third step in the sequence was the filing of new charges, here the instant indictments. What rounds out the sequence is the fact that the information necessary for the new charges was known to the government prior to the time that the first case was charged.

The record in this case goes even further than many prosecutorial vindictiveness cases by showing additional evidence of vindictiveness. The government filed in this case a second conspiracy charge against defendant DeMichael after he already was convicted of that same conspiracy in the Northern District of Illinois. The time sequence of the two conspiracies had significant overlaps,

the criminal objects of the two conspiracies were the same, the central figures were the same, and the mode of operation was consistent. Eventually the court dismissed this conspiracy count for double jeopardy reasons.

Petitioner carried his threshold burden. He sought to go even further. He requested that the magistrate order the government to produce any documents relating to information that passed between the Northern District of Illinois and the Eastern District of Wisconsin United States Attorneys offices concerning the disposition of the case in Illinois. That request was denied. The petitioner made out a sufficient showing of a realistic likelihood of vindictiveness to require that those documents be produced. The government offered no legitimate reason to keep the communications between the two offices secret.

In short, then, whether it be called a "realistic likelihood of vindictiveness", the "appearance of vindictiveness," or a prima facie case of "actual vindictiveness," petitioner carried his burden. The government offered no rebuttal. The prosecution should have terminated or at least the magistrate should have been ordered to review the requested discovery material and re-open the hearings if material evidence was produced.

II. THE GOVERNMENT FAILED TO RESPECT THE TERMS OF A PRIOR PLEA BARGAIN WHICH WOULD HAVE PRECLUDED PROSECUTION OF THE INSTANT CHARGES.

Petitioner also moved to dismiss the prosecution on the ground that it was in violation of the plea agreement that disposed of the earlier prosecution in the Northern District of Illinois.

As a matter of due process of law, the government is obligated to respect the bargain it enters into when a defendant pleads guilty. *Santobello* v. *New York*, 404 U.S.

257 (1971). Where, as in this case, a criminal defendant has surrendered his constitutional rights to trial by a jury, and has commenced serving a sentence entered upon his plea of guilty, he is entitled to specific performance of the terms of the bargain. *See Cooper* v. *United States,* 594 F.2d 12 (4th Cir. 1979).

Two witnesses testified concerning the terms of that plea agreement. One was James Shellow, who appeared as one of defendant DeMichael's attorneys in the Northern District of Illinois. The other was Alexandra Kwoka, then a staff attorney with the Strike Force in the Northern District of Illinois. She was in charge of the prosecution in the Northern District of Illinois.

Shellow testified that he was concerned with a plea which disposed of all matters involving Mr. DeMichael of which the government was then aware. He testified that he asked for an agreement that would dispose of the case in the Northern District of Illinois *and all pending investigations.* He testified that the government attorney, Kwoka, objected to inclusion of tax prosecutions. With the exception of the tax prosecutions, his testimony was that he asked for and received an agreement that the plea would dispose of all pending investigations against DeMichael. His testimony that this was part of the terms of the agreement was specific.

Kwoka testified differently. She testified that her response to Shellow's request to close out all matters known to the government was that she could only deal with prosecutions in the Northern District of Illinois.

The instant prosecution was under investigation by the United States at the time that the plea was entered in the Northern District of Illinois. That was a fact known to the government and not known to the defendant or his attorneys. Kwoka knew it. She admitted that under oath. She also admitted that she did not inform Shellow that

the instant case had changed its forum from state to federal court. The state court prosecutor received an assurance from the United States Attorney's office in the Eastern District of Wisconsin some months prior to May, 1980, that the federal government would take over the prosecution of the Hobl matter.

Of course, Shellow could have insisted on an agreement that included the Hobl matter when he spoke to Kwoka in the Northern District of Illinois. He had no cause to do so since, at that time, *so far as he was aware,* the Hobl matter remained in state court. The first notice that DeMichael had that the matter had transferred its forum to the federal court came on November 19, 1980, when the first of the instant indictments was returned.

The issue is compounded by the fact that part of the trial stipulation, it was established that when one of DeMichael's co-conspirators was arrested at Hobl's house, he had arrived in a truck registered to Shure-fire Heating Co. of Antioch, Illinois. A copy of the title for the truck was in the glove compartment and it bore another co-conspirator's signature as owner. A blank Shure-fire Heating Co. contract was also found in the glove compartment of the truck.

These documents demonstrate that Shure-fire Heating Company was involved in the Hobl transaction. This is significant because both Kwoka and Shellow acknowledged that the Illinois plea agreement included activities involving Shure-Fire Heating Company. At the evidentiary hearing Kwoka said:

> Q. "And would you have considered it a breach of the plea agreement for the government to have prosecuted Mr. DeMichael involving one of those named heating companies, simply by changing venue to the Eastern District of Wisconsin?
>
> A. "Yes." (TR. 3/3/81 at 66)

By the Chicago prosecutor's own admission the plea agreement was breached.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

STEPHEN M. GLYNN
JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535
Counsel for
Carl A. DeMichael, *Petitioner*

March 21, 1983

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1388

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARL A. DEMICHAEL,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 80 CR 146—Robert W. Warren, *Judge.*

Argued September 13, 1982—Decided October 29, 1982

Before WOOD and POSNER, *Circuit Judges,* and DUMBAULD*, *Senior District Judge.*

DUMBAULD, *Senior District Judge.* After a jury was selected and sworn, defendant and the prosecution negotiated a four-page handwritten stipulation or "agreement of the parties with respect to the disposition of the above-

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* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

captioned matter." This agreement provided that "plaintiff and DeMichael have entered into a [sixteen-page typed] stipulation of facts and expected testimony which the Court may consider in determining the defendant's guilt or innocence on Count 1 of the superceding [*sic*] indictment in this case." Defendant DeMichael signed both stipulations and in open court confirmed and agreed to the four page handwritten stipulation filed on his behalf by his counsel Waring R. Fincke. (Tr. 85-86).

It should be noted that the agreement made by defendant DeMichael envisaged "disposition" of the case. That was to be accomplished by a determination by the Court regarding "the defendant's guilt or innocence on Count 1" and in making such determination the Court was to "consider" the "stipulation of facts and expected testimony" contained in the 16-page typed stipulation.

The reason the Government agreed to disposition of the case in this matter was its desire to obtain restitution for the victim of the fraud. This relief was not obtainable through a conventional jury trial but required voluntary action by the defendants. The Court co-operated by agreeing to postpone the date of sentencing in order to give defendants time to raise the money. The agreement anticipated conviction by the Court in a non-jury trial; in fact the State of Wisconsin's agreement to refrain from further prosecution was conditioned upon a conviction at the trial level, either by jury trial or non-jury trial. In the event of a reversal on appeal, Wisconsin would accept that outcome and observe the agreement not to prosecute further. But in the event of acquittal at the trial level the State would be free to take further action.

All parties agreed that the contentions raised in defendant's pre-trial motions (and post-trial motions if needful under the rules to preserve the points on the record) were preserved for consideration by the Appellate Court. This,

indeed, was DeMichael's chief concern and principal defense. The stipulated facts sufficed to establish his guilt of the home improvement fraud with which he was charged; his reliance was on the defense of "vindictive prosecution" and violation of a prior plea agreement and double jeopardy.

Since the jury had been sworn in the case at bar, the Court insisted upon elimination of the double jeopardy issue with respect to the instant proceeding; and also insisted, since the jury could not be held in abeyance indefinitely, upon prompt disposition of the case either by stipulation or by jury trial.

Accordingly, after the stipulations had been filed, the Court discharged the jury, and after a recess to review the evidence, proceeded in a non-jury trial to "adjudge Defendant, Carl DeMichael, guilty as charged in Count 1 of the indictment."

From the foregoing summary gleaned from the transcript, it seems clear that the defendant knowingly and intentionally waived his right to jury trial. The contention in this Court to the contrary is an obvious afterthought. He sat through and took part in steps specifically designed to eliminate the impending jury trial, and empower the Court to dispose of the case on the basis of stipulated facts, preserving for appellate review the defenses upon which he really relied. Cf. *U.S.* v. *Kopel*, 552 F.2d 1265, 1274 (7th Cir. 1977).

DeMichael had been involved in prior State and federal prosecutions for home improvement frauds, and had discussed the case at bar thoroughly with able counsel. On July 25, 1980, as his brief shows, he entered a plea to five counts in a federal prosecution in the Northern District of Illinois at No. 80 CR 285. To postulate his ignorance of the nature of his rights with respect to jury trial would require a wild flight of imagination. There is no basis for finding any harmful error injurious to DeMichael.

It is true that we feel misgivings in the departure from the normal practice of requiring that jury trial be waived "in writing with the approval of the court and the consent of the government" in accordance with FRCrP 23(a). In substance and fact, however, there was a waiver in writing, signed by the defendant, and approved by the Court and the Government. It would be adhering to form over substance, in view of the circumstances of the case at bar, to insist upon an additional separate piece of paper and further colloquy.

We think it proper to emphasize, however, that the proper practice, which should uniformly be observed in the absence of unusual circumstances, is as stated in *U.S.* v. *Scott*, 583 F.2d 362, 364 (7th Cir. 1978).

We turn now to DeMichael's real arguments as developed in the pre-trial motions which were preserved for appellate review. The first point is "vindictive prosecution." This contention merely asserts that the instant prosecution in Wisconsin is precluded because it was instituted after two State prosecutions in Wisconsin (apparently relating to robbery of an apartment, see 91 Wis. 2d 847 and 96 Wis. 2d 232) had been dismissed, and the orders of dismissal later reversed by the Wisconsin Supreme Court: and a federal prosecution in the Northern District of Illinois at No. 80 CR 285 had been disposed of on a plea bargain.

That is not enough to constitute vindictive prosecution. That term is ordinarily used to describe a prosecution which is vindictive in the normal sense of the word, resulting from specific animus or ill will (as the prosecution of all Democrats who violate the election laws, or all gamblers who do not make timely payoffs to the "bagman"); or a prosecution which charges a more serious violation ("upping the ante") in retaliation for the exercise of a legal or constitutional right in connection with the original

charge. *Blackstone* v. *Perry*, 417 U.S. 21, 27-28 (1974); cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362-65 (1978). The latter case holds that there is no "vindictiveness" when the prospect of prosecution for a more serious crime arises in the context of normal exercise of prosecutorial discretion and occurs during legitimate plea bargaining negotiations.

Similar legitimate exercise of prosecutorial discretion is all that has been shown in the case at bar. There is no principle of law which requires, as defendant's argument would require, that a person who commits more than one crime may be prosecuted only for one of them. Likewise under our federal system there can be simultaneous federal and State prosecutions where similar or identical offenses under the two systems of law are committed as the result of particular conduct on the part of a defendant. Moreover, there is nothing more than exercise of normal prosecutorial discretion involved if the prosecuting attorney is satisfied to drop one prosecution if an adequate result is obtained in the other, or decides to proceed in the second case if an inadequate result is obtained in the first.

There is no vindictiveness as long as the prosecutor's decision is based upon the normal factors ordinarily considered in determining what course to pursue, rather than upon genuine animus against the defendant for an improper reason or in retaliation for exercise of legal or constitutional rights. For example, suppose that bank robbery is an offense against both State and federal law, and in the State courts the robber is convicted only of illegally parking the getaway car in front of the bank, and pays a small fine; is it vindictive if the federal prosecutor seeks an indictment for the federal offense of bank robbery, even though he would have stayed his hand if the defendant had received a substantial sentence in State

court? The same reasoning applies if the defendant has robbed banks in several judicial districts. The United States Attorney in one district may properly take into consideration the results of prosecution in another district in determining whether to proceed with prosecution for the offenses committed within his bailiwick.

We are satisfied that there has been no impropriety in the actions of the prosecuting authorities, both federal and State, in the case at bar.

We now turn to the question whether there has been any impermissible deviation by the Government from the plea bargain with defendant in the case in the Northern District of Illinois. We begin by reaffirming the duty of the Government to respect its bargains. *Santobello* v. *N.Y.*, 404 U.S. 257, 262 (1971).

It is always unseemly for lawyers to find themselves cast in the role of witnesses testifying regarding cases they are handling. Especially is this true in criminal cases, and with respect to the terms of a plea bargain. Such agreements should be reduced to writing. Indeed, the procedures of Rule 11 FRCrP should be followed, and the terms disclosed to and approved by the Court in accordance with Rule 11(e)(2) and recorded in accordance with Rule 11(g).

Ordinarily the careful observance of the procedure prescribed by Rule 11 will eliminate all possible ambiguity as to the terms of the agreement, although in exceptional circumstances (especially during the transitional period before the legitimacy of plea bargaining and the appropriate procedures to be followed were fully understood) an evidentiary hearing is not absolutely precluded. *Blackledge* v. *Allison*, 341 U.S. 63, 74, 82 (1977).

It is most distasteful to be confronted with conflicting testimony by lawyers with respect to the terms of an agreement which ought to be clear and indisputable in its terms. Fortunately we are able to dispose of the case at bar without becoming involved in questions of credibility.

Defendant's attorney James Shallow, who negotiated the Illinois plea bargain, testified that he was concerned with federal investigations in Colorado and Indiana against DeMichael, and wished to terminate all then pending federal investigations, but agreed to make an exception for tax matters. He admitted that there was a document memorializing the plea agreement in a written memorandum, (GX 2), but asserted that this did not include all the items agreed to. He did not insist on an agreement covering the Hobl matter (involved in the case at bar) because he thought that that was merely a State case in Wisconsin, and not a federal matter. He accuses the federal attorney with whom he was dealing of sharp practice because she did not disclose that the Wisconsin prosecutors had been informed by the United States Attorney's office for the Eastern District of Wisconsin that the federal government would proceed with the case involving fraud against Hobl. He attacks her testimony that she was authorized only to dispose of the Illinois prosecution on the ground that she worked for a "Strike Force" office that operated also in Wisconsin.

Regardless of the truthfulness of her testimony as to her authority to negotiate, it seems good practice for the federal prosecutors handling cases within a given district to limit their representations to the cases at hand. If defendants wish assurances relating to more extensive geographical areas they should seek specific agreements expressly covering such matters and insist upon unquestionable authorization from superior officials in the Department of Justice.

In the disclosure of the plea agreement actually presented to the Court in the Illinois case it was stated:

> The Government agrees that no additional charges will be brought in the Northern District of Illinois for the period covered by this indictment involving the following companies: A-OK Heating Company, or some variant of that name; All State Heating Company or some variant of that name; Aaron Heating Company; World Wide Heating Company, Common Wealth Heating Company; and Shure-Fire Heating Company. (app. 33)

These were names under which defendant and his coconspirators had done business in the course of their widespread home improvement frauds.

Defendant contends that prosecution in the case at bar is precluded under the above-quoted portion of the Illinois plea agreement because when one of the coconspirators was arrested at Hobl's home he was driving a truck registered to Shure-Fire Heating Company and a copy of the title for the truck was in the glove compartment as well as a blank contract bearing the name Shure-Fire Heating Company.

However, these are immaterial circumstances. The situation is no different from what it would have been if a workman came to the job site in his own car, or a taxicab, or was dropped off by a friend. The testimony discloses that the alias being used by defendant and his coconspirators, that is to say, the name under which they were doing business when they entered into their fraudulent contract with Hobl was Capitol Chimney and Roofing Company (app. 59).

The Hobl case cannot be regarded as a charge "involving . . . Shure-Fire Heating Company" within the meaning of the Illinois plea agreement.

The contention that the prosecution in the case at bar constituted double jeopardy (if that argument is still being pressed in this Court—it is not specifically addressed by defendant's brief) is obviously merely a restatement of the argument regarding violation of the plea agreement, and is hence equally unmeritorious.

For the foregoing reasons the judgment of the District Court is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 20, 1983
Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Edward Dumbauld, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 82-1388 vs.

CARL A. DeMICHAEL,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 80 CR 146
Robert W. Warren, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.